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Supreme Court, U.S.
FILED
MAY 12 1986
JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

GIOVANNI MASI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

-against-

GIOVANNI MASI,

Defendant.

----------x

83 CR 00141 (S)

Memorandum of
Decision and Order

September 10, 1985

A P P E A R A N C E S:

HONORABLE RAYMOND J. DEARIE
UNITED STATES ATTORNEY
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U.S. Attorney

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MISHLER, District Judge

Defendant, Giovanni Masi, was

convicted after trial before a jury of (1) conspiracy to distribute cocaine in violation of 21 U.S.C. S 846, (2) distribution of cocaine in violation of 21 U.S.C. S 841 (a)(1), and (3) possession with intent to distribute in violation of 21 U.S.C. S 841 (b)(1)(A). The verdict was returned on July 7, 1983. Defendant moved to set aside the verdict and for a new trial pursuant to Fed. R. Crim. P. 33 and arrest of judgment pursuant to Fed. R. Crim. P. 34.

The pre-sentence report contained the following:

> . . . He (Masi) is described by government authorities as a major cocaine smuggler and distributor. He is suspected of being a major source of supply for methaqualone in the Florida area. If deemed necessary by the Court the government will produce an individual who can testify to these allegations. (p. 4).
>
> . . . (O)n March 24, 1983 Giovanni

> Masi was arrested on the instant offense in his apartment in Miami, Florida. Found in Masi's bedroom were two loaded nine millimeter operable handguns and one loaded operable .380 caliber firearm. (p. 3-4).

On August 19, 1983, the court conducted a "Fatico" hearing. The court found that the challenged statements were supported by the evidence. On August 24, 1983, the court, having denied Masi's motion to set aside the verdict and for a new trial, sentenced him to three (3) concurrent terms of ten (10) years and a special parole term (on Counts Two and Three) of ten (10) years. The judgment of conviction and sentence was affirmed, 742 F. 2d 1442 (2d Cir. 1984), cert. denied, ____ U.S. ____ (January 21, 1985).

Masi now moves for (1) a new trial on the ground that the court failed

to make findings required under Rule 32 (c)(3)(D) on the challenged matters in the pre-sentence report, and (2) a reduction in sentence pursuant to Rule 35 on the grounds that he has been a productive member of society and that his "institutional conduct has been beyond reproach." (Aff. April 5, 1985, p. 5-6).

Subsequent to making the original motion, Masi asserted as an additional ground for a new trial "information . . . made known to the undersigned attorney to the effect that the co-defendant, Joseph Cinelli, may now be willing to discuss information in this case with the Defendant's attorney. In particular, reference has been made to a meeting between law enforcement agents (FBI and DEA) with Mr. Cinelli in Elmont, New York to make a case against the defendant. The co-defendant has

also disclosed other information indicating that there were other investigative steps, etc. . . ." (Aff. July 2, 1985, p. 2).

DISCUSSION

We deny defendant's Rule 35 motion with a brief reference to the gravity of the offenses. We believe that he is a danger to society and a substantial prison term is appropriate.

We are satisfied that the findings made at the conclusion of the "Fatico" hearing comply with Rule 32 (c)(3)(D). United States v. Velasquez, 748 F. 2d 972 (5th Cir. 1984) is inapposite. There the "court made no response to Velasquez's objection." Id. at 974. The court in Velasquez remanded the case for resentencing. Here the court conducted an extensive hearing and made findings.

Masi asserts as a gound for a

new trial pursuant to Rule 33, that it is "in the interest of justice." The affidavit in support of the motion describes Cinelli's information as constituting "newly discovered evidence." Guiseppe Cinelli pled guilty prior to the commencement of Masi's trial. Cinelli was a member of the conspiracy with which Masi was charged. The moving papers fail to show that (1) Masi attempted to obtain Cinelli's testimony at trial with due diligence; (2) the nature of the testimony; and (3) how it became available after trial.

A motion for a new trial on newly discovered evidence should be granted only where the moving party shows: (a) that the evidence was discovered since trial; (b) the movant had used due diligence; (c) the evidence would not be merely cumulative or

impeaching; (d) that the evidence is material to the issues; and (e) that the evidence would probably produce a different result. United States v. Alessi, 638 F. 2d 466, 479 (2d Cir. 1980); United States v. Williams, 613 F. 2d 573, 575 (5th Cir. 1980); United States v. Conzemims, 611 F. 2d 695, 696 (8th Cir. 1979).

The vague and conclusory statements of Masi's counsel are insufficient. All the motions are denied, and it is

SO ORDERED.

U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of March, one thousand nine hundred and eighty-six.

PRESENT:

Hon. James L. Oakes,
Hon. Ralph K. Winter,
Hon. George C. Pratt,
Circuit Judges.

United States of America,
Appellee,

v. 85-1387

Giovanni Masi,
Appellant.

O R D E R

Giovanni Masi appeals from the denial of several post-sentence motions by the United States District Court for the Eastern District of New York, Jacob Mishler, Judge. We affirm.

Masi moved for a new trial under Fed. R. Crim. P. 33 on two grounds. The first ground was that a new trial was merited because three DEA reports prepared during the investigation of Masi were not released to him prior to trial despite his general request for documents. We have examined these three documents and find that they do not warrant a new trial: there is no significant chance that the introduction of this material, which contains nothing inculpatory or valuable for impeachment purposes, at a new trial would lead to a different result. See United States v. Bagley, 105 S. Ct. 3375, 3379-81 (1985); United States v. Alessi, 638 F. 2d 466, 479 (2d Cir. 1980). Masi's other ground for his Rule 33 motion -- that codefen-

dant Cinelli was willing to discuss the case -- is similarly meritless since he offers no evidence that anything Cinelli might say would significantly increase Masi's chance of acquittal.

Masi's contention that Judge Mishler failed to make requisite findings with regard to disputed facts in the presentence report is also meritless. After the Fatico hearing, Judge Mishler resolved major points of contention by holding that Masi "was a major cocaine dealer and dealt in qualudes (sic) ... (and that) he was in business for a long time." Judge Mishler's determination that Masi's ample stock of loaded guns indicated that he was violent is not explicitly stated, but is nonetheless clear. The fact that Judge Mishler made

the latter finding before the evidentiary part of the Fatico hearing occurred does not make it invalid. An evidentiary hearing was not required; it was necessary only that the judge fairly consider the claims advanced, as he did. See United States v. LoRusso, 695 F. 2d 45, 51 n.2 (2d Cir. 1982), cert. denied, 460 U.S. 1070 (1983).

The requirements of Rule 32(c)(3)(A) and (D) that the prisoner be allowed to read his presentence report at "a reasonable time before imposing sentence" and that he be given adequate opportunity to comment on the report were also satisfied. Masi read the report on August 19, five days before sentencing. His attorneys had the opportunity to comment on the report

both on August 19 and before sentencing on August 24.

Judge Mishler acted well within his discretion in denying Masi's motion to reduce his sentence. The evidence below demonstrated that Masi was a major drug trafficker, and the offenses for which he was convicted are serious.

Affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

JAMES L. OAKES,

RALPH K. WINTER,

GEORGE C. PRATT,
Circuit Judges.